No. 805

Office-Supreme Court, U.S.
FILED
FEB 8 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK OF MEMPHIS,
Petitioner,
vs.
THE AETNA CASUALTY AND SURETY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States.

Your petitioner, The First National Bank of Memphis (a national banking institution organized under the Acts of Congress, hereinafter referred to as the Bank), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on November 19, 1962, affirming the judgment of the District Court of the United States for the Western District of Tennessee, Western Division, entered July 27, 1961.

OPINION OF COURT OF APPEALS.

The opinion of the Court of Appeals has not yet been reported, but copy of same is attached and made a part of this petition.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The judgment of the Court of Appeals, Sixth Circuit, sought to be reviewed was dated and entered November 19, 1962 (Judgment and Opinion are contained in certified copy of the Record). Order staying mandate pending this application was entered December 21, 1962 (Copy of said order is attached to and made part of this petition).

2. The Court of Appeals has decided, against a National Bank, principles of law extremely important to many, if not all, National Banks. National Banks are organized under and regulated by Federal Laws (12 U. S. C. A. §§ 22-24; 161; 481); are member banks whose deposits are insured by Federal Deposit Insurance Corporation; and may be required by the Comptroller of the Currency or by F. D. I. C. to carry insurance against losses covered by the Bankers' Blanket Bond (12 U. S. C. A. §§ 1814, 1828).

National Banks which insure against these losses may so insure by obtaining Bankers' Blanket Bond (Standard Form No. 24). This is the form of bond approved by the Surety Association of America (Stip. 8, R. 78a) and is uniformly issued by the Association members to National Banks in practically all, if not all, states in the union.

The bond provisions relied upon have not been, and should be, construed by this Court, because the meaning of the bond and the extent of its coverage are of such

extreme importance to National Banks and to the Comptroller of the Currency.

3. The Court of Appeals has decided an important question of local law in a way that probably is in conflict with local decisions. The Court of Appeals has held that, although the Bank's loan had been fully satisfied, its collateral and personal guaranty surrendered, its notes cancelled and unearned interest returned, Exclusion 1 (d) of the Bond, excluding losses resulting from the non-payment of a loan, applied and prevented recovery. The Bank's loan was paid within the definition of that term by the Tennessee Courts, and the Court of Appeals has declined to follow rules of construction as laid down by the Tennessee Courts.

4. There is a conflict between the decisions of courts of different circuits in regard to the proper construction of Insuring Clause (E) of the Bankers' Blanket Bond. The Court of Appeals for the Sixth Circuit has apparently construed this clause as covering losses from counterfeiting only if the securities were "counterfeited as to signature." In **Fidelity Trust Company v. American Surety Company**, 268 F. 2d 805, the Third Circuit has held that the phrase "as to signature" does not modify the word "counterfeited." The Third Circuit, under facts closely similar to those in the present case, held that the securities involved were counterfeited, although there was no "counterfeiting as to signature." The Court of Appeals for the Sixth Circuit in this case has held that the warehouse receipts were not "counterfeited."

5. Jurisdiction is conferred on this Court by 28 U. S. C. A. §§ 1254, 2102, 2106. Jurisdiction in the District Court was by reason of diversity of citizenship under 28 U. S. C. A. § 1332 (a) (1).

QUESTIONS PRESENTED FOR REVIEW.

QUESTION I.

Does Insuring Clause (B) of the Bankers' Blanket Bond (indemnifying against loss through false pretenses) cover the insured Bank's loss by reason of suit to recover a voidable preference filed by the Trustee in Bankruptcy of a former borrowing creditor when there could be no recovery by the Trustee except for the fact that the borrowing creditor had perpetrated a fraud on the Bank through false pretenses by depositing with the Bank as collateral worthless warehouse receipts?

QUESTION II.

Does Exclusion Section 1 (d) of the Bankers' Blanket Bond (exempting any loss resulting from the non-payment of a loan) relieve the Indemnitor from coverage under Insuring Clause (B) where the note is fully paid and the Bank's loss results from the suit filed by a Trustee in Bankruptcy to recover judgment for the amount paid as a voidable preference made within four months of the adjudication of bankruptcy?

QUESTION III.

Does Insuring Clause (E) of the Bankers' Blanket Bond (indemnifying against forgery as to signature and against counterfeits) cover a loss by the Bank where the documents (warehouse receipts) are false and fraudulent in that they are not what they purport to be (receipts for beans in storage) as no beans were received as represented by the documents?

QUESTION IV.

Where the insured Bank notifies the Indemnitor of suits filed, and the Indemnitor does not tender counsel but denies any liability, does Insuring Clause (B) of the Bankers' Blanket Bond indemnify the insured Bank against loss by reason of the Bank's making in good faith a reasonable settlement of a suit to establish a voidable preference filed by the Trustee in Bankruptcy of a former borrowing customer when there would be no liability of the Bank except for the fraud perpetrated through false pretenses by the customer and counterfeiting by the warehouse company of warehouse receipts used as collateral?

QUESTION V.

Is the National Bank entitled to recover court costs and reasonable attorneys' fees paid in defending actions against it where the alleged liability constituted a loss under the terms of the Bond; either (1) as a part of the loss under Insuring Clause (B), or (2) under the specific indemnity against "court costs and attorneys' fees," even though no litigated judgment was actually rendered against the Bank?

STATUTES AND REGULATIONS

The following statutes and regulations are involved:

12 U. S. C. A., § 1814. **Insured banks; certificate of Comptroller of Currency authorizing transaction of banking business**

(a) Every bank, which is an insured bank on September 21, 1950, shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this chapter.

Sept. 21, 1950, c. 967, § 2 (4), 64 Stat. 873

12 U. S. C. A., § 1828. **Regulations governing insured banks —Display of signs**

(c) The Corporation may require any insured bank to provide protection and indemnity against burglary, defalcation, and other similar insurable losses. Whenever any insured bank refuses to comply with any such requirement the Corporation may contract for such protection and indemnity and add the cost thereof to the assessment otherwise payable by such bank.

Sept. 21, 1950, c. 967, § 2 (18), 64 Stat. 873

11 U. S. C. A., § 96. **Preferred creditors**

(a) (1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

As amended Mar. 18, 1950, c. 70, § 1, 64 Stat. 24.

(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee **may recover** the property or, if it has been converted, **its value** from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value; . . .

July 1, 1898, c. 541, § 60, 30 Stat. 562; Feb. 5, 1903, c. 487, § 13, 32 Stat. 799; June 25, 1910, c. 412, § 11, 36 Stat. 842; May 27, 1926, c. 466, § 14, 44 Stat. 666; June 22, 1938, c. 575, [illegible] 52 Stat. 869

12 U. S. C. A., § 481. **Appointment of examiners; examination of member banks, State banks, and trust companies; reports**

. . . The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

As amended June 30, 1948, c. 762, § 1, 62 Stat. 1163; Apr. 30, 1956, c. 228, § 1, 70 Stat. 124

STATEMENT.

This litigation involves an action by the Bank against The Aetna Casualty and Surety Company (hereinafter re-referred to as Aetna) to recover $853,859.95 as a loss covered by the Bankers Blanket Bond (Standard Form No. 24) issued by Aetna to the Bank (R. 4a, 78a and 98a).

The bond provided seven different coverages (designated (A) to (G)). Insuring Clause (B) insured against losses resulting from false pretenses; Insuring Clause (E) insured against losses resulting from counterfeited securities. Both of these clauses are relied upon by the Bank. All of the coverages, (A) through (G), were included in the Banks bond in the amount of $1,000,000, except the coverage by Insuring Clause (E) which was limited to $250,000 (R. 98a-107a).

Essential Facts.

The loss suffered by the Bank resulted from the false pretenses of the Butler-Foster Milling Company (hereinafter referred to as Butler) and from the issuance of fraudulent warehouse receipts by Alabama Grain Elevator Company (hereinafter referred to as Alabama Grain), which receipts certify that Alabama-Grain held in storage, subject to the order of the holder thereof, beans of the quality and quantity specified in the receipts when in fact it held no beans. The receipts were on the printed forms of Alabama Grain, regular in appearance and with genuine (though unauthorized) signatures.

(Stip. 29-43, R. 82a-85a; Exhibit B, R. 126a; Exhibit D-1, R. 131a; Exhibit I, Gearhart, R. 289a.)

On February 18, 1955, Butler had deposited as collateral with the Bank fraudulent warehouse receipts of Alabama grain for 1,517,363 bushels of soya beans. Upon this col-

lateral and the personal guaranty of L. V. Butler, Butler had obtained a line of credit with the Bank in the amount of $3,000,000. On this date, Butler's debt to the Bank was $2,999,491.00.

(Exhibit B, R, 126a.)

On February 18, 1955, Butler paid the Bank $300,000.00 and the Bank released some of the receipts, leaving Butler owing the Bank $2,699,491.00, secured by warehouse receipts for 1,367,739 bushels of beans.

(R. 83a; Exhibit B, R. 126a.)

On March 1, 1955, the Bank delivered to Butler on trust receipt the collateral held, and on that date Continental Grain Company (hereinafter referred to as Continental) purchased from Butler 1,299,839 bushels of beans, supposedly represented by the receipts, and paid over $3,000,000 therefor. On the same date, Butler paid in full the Bank loan (none of which was in default), the collateral and personal guaranty were surrendered, and the Butler notes were marked "Paid" and unearned interest credited to the Butler account.

(R. 83a-84a.)

Continental found no beans in Alabama Grain warehouse and forced Butler into bankruptcy, it being so adjudicated April 27, 1955.

(R. p. 84a.)

On March 16, 1956 (more than a year after the loan was fully paid), Continental sued the Bank to recover the amount received by the Bank in satisfaction of the Butler loan, on the theory that the Bank had received Continental's money and was a resulting trustee and also that the Bank was the agent of Butler, assisting in making the sale of the fraudulent receipts to Continental. Butler's

trustee in bankruptcy cross-filed against the Bank, seeking to recover the amount received on March 1, 1955 by the Bank, on the theory that, since the receipts were worthless, the Bank was a general creditor and had received a voidable preference. Later, Butler's trustee also filed an action on the same theory of voidable preference to recover the $300,000.00 received on February 18, 1955 by the Bank.

(Exhibit F, R. p. 137a; Exhibit L, R. p. 163a; Exhibit P, R. p. 173a.)

The Continental case was tried and resulted in a judgment for the Bank.

(Exhibit S, R. pp. 182a, 222a.)

The trustee's cases had been prepared and were ready for trial before a jury when they were settled.

(R. pp. 180a; 94a; 95a; 344, 350a.)

By reason of these litigations, the Bank suffered losses as follows:

Consent judgment in favor of Butler's trustee in bankruptcy	$650,000.00
Miscellaneous expenses	13,859.95
Attorneys' fees	190,000.00
Total	$853,859.95

(R. p. 232a.)

After notice to Aetna of its claim and denial of liability by Aetna, the Bank filed this action to recover these losses.

(R. p. 39.)

The District Court dismissed plaintiff's action, holding that the loss of the Bank was the result of false pretenses

and the Bank would be entitled to recover under Insuring Clause (B) but for the provisions of limiting clause 1 (d) which excludes from coverage by Insuring Clause (B) "any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the insured".

(R. 108a.)

The District Court also held that the Bank was not entitled to recover under Insuring Clause (E) because the only counterfeiting covered by this clause is of securities "which prove to have been counterfeited . . . as to the signature of any maker . . . endorser, etc."

(R. pp. 62a-63a; 65a.)

The Court of Appeals affirmed the District Court on both grounds.

(Sup. R. p. 1.)

ARGUMENT.

As to Question 1.

The Bank's losses were "through false pretenses" and are covered by Insuring Clause (B) of the bond, which provides that the bond covers

> "any loss of property through false pretenses."
>
> (R. p. 100a.)

District Court's Conclusion of Law No. 9 (R. p. 62a);
District Court's oral opinion (R. p. 337a);
Court of Appeals Opinion (Sup. R. p. 3);
Hartford Accident and Indemnity Co. v. Fidelity Deposit and Insurance Co., 294 Fed. 2d 933;
Fidelity & Casualty Co. v. Bank of Altenberg, 216 Fed. 2d 294.

Opposing counsel have conceded throughout the trials of this case that if the bank suffered a "loss", within the meaning of the bond, it was through "false pretenses" and would be covered except for Exclusion 1 (d). (Conclusion of Law 9, R. 62a-63a).

As to Question 2.

The Bank's loan was fully paid on March 1, 1955, and Exclusion 1 (d) has no application. It excludes from coverage:

> "Any loss, the result of the complete or partial nonpayment of or default upon any loan made by or obtained from the insured."
>
> (R. p. 108a.)

Payment is a legal term, defined in Tennessee as follows:

> "A payment is a delivery of money or its equivalent in either specific property or services by one person

from whom it is owed to another person to whom it is owed. In a legal sense there must be—(1) a delivery, (2) by the debtor, or his representative, (3) to the creditor, or his representative, (4) of money or something accepted by the creditor as the equivalent thereof, (5) with the intention on the part of the debtor to pay the debt in whole or in part, and (6) accepted as payment by the creditor."

Sullivan v. Tigert, 1 Tenn. Ap. 262, 266;
Am. Jur., Vol. 40 (Payment), § 2, p. 715.

"It is a universally recognized rule that money voluntarily paid under a claim of right to payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal."

Baird Transfer Co. v. Nashville & Lebanon Turnpike Co., 8 Tenn. Ap. 317.

An earlier form of the bond excluded

"any loss resulting from any loan made by the insured."

Security Trust and Savings Bank of San Diego v. New York Indemnity Co., 220 Calif. 372, 31 Pac. 2d 365

Aetna and the other members of the Surety Association of America using Bankers Blanket Bonds thereafter amended the bond so that, for Exclusion 1(d) to apply, the loan of the insured bank must remain **unpaid.** The amendment was for the purpose of restricting the exclusion, and must be given a meaning different from the wording previously used in the bond.

The District Court and the Court of Appeals construed Exclusion 1 (d) as if it contained the following:

If a note is fully paid and the insured bank is thereafter sued to recover a judgment for the amount paid, the loss is excluded from coverage under Insuring clause (B).

No such provision is contained in the bond. A loan once voluntarily paid cannot become again unpaid.

Exclusion in insuring contracts must be strictly construed against the insuror.

"It is the universal rule of courts to construe language used in an insurance policy to limit the liability of the company strongly against the company."

Hahn v. Home Life Insurance Co., 169 Tenn. 237;
Manufacturers Accident Indemnity Co. v. Dorgan, 58 Fed. 945;
Couch on Insurance, 2nd Ed., § 15:92, pages 835, 836, 837.

"The rule for the construction of contracts for insurance is that, having indemnity for its object, they will be liberally construed to that end."

Insurance Co. v. Hughes, 78 Tenn. (10 Lea.) 461.

"The sole object of insurance being indemnity against loss, any ambiguity in the policy will be resolved against the insurer, so as to effectuate that purpose."

Insurance Co. v. Ayers, 88 Tenn. 728, 13 S. W. 1090.

"That construction of an insurance policy will be adopted, where its language is of doubtful import, which is most favorable to the assured, and best secures to him that indemnity against loss, which is the sole object of Insurance."

Hoffman v. Insurance Co., 88 Tenn. 735, 14 S. W. 72.

"It is well settled that when a policy of insurance contains contradictory provisions, or has been so framed as to make necessary a judicial construction, its own words will be taken most strongly against it."

Royal Ins. Co. v. Vanderbilt Ins. Co., 102 Tenn. 264, 52 S. W. 168.

All of the above quotations are approved by the Tennessee Supreme Court in

Traders Insurance Co. v. Dobbins, 114 Tenn. 227, 239, 86 S. W. 383.

"As a part of the rule of strict construction of exclusions against the insuror, there is the subordinate rule that the burden of proof of the applicability of a limitation or exclusion is on the insuror."

Southern Surety Co. v. Poles, 8 Tenn. Ap. 78, 82; **American Indemnity Co. v. Sears**, 195 Fed. 2d (6th Cir.) 353, 356.

"It is well settled that a bond of this character (indemnity bond) is to be construed as an insurance contract."

Hunter v. U. S. F. & G. Co., 129 Tenn. 572-581.

As to Question 3.

The warehouse receipts of Alabama Grain which caused the Bank's loss were counterfeited within the meaning of Insuring Clause (E) of the bond, which covers

"Any loss through the insured's having . . . extended any credit . . . upon any securities . . . which prove to have been counterfeited or forged as to the signature of any maker, etc."

(R. p. 103a.)

Counterfeiting has been acceptably defined as including more than the imitation of a genuine existing original.

"The term (counterfeit) has been held to apply, not only to an imitation of a genuine original, but to **any paper which purports to be a genuine original.**"

C. J. S., Vol. 20 (Counterfeiting), §1, p. 719.

"An instrument may be counterfeit, notwithstanding it is purely fictitious, as where no note of such denomination has ever been issued."

Am. Jur., Vol. 14 (Counterfeiting), §2, p. 173;
State v. Carr, 5 N. H. 367;
Commonwealth v. Smith, 7 (Pick.) Mass. 127.

The Court of Appeals for the Third Circuit, in holding securities counterfeited although no original ever issued, affirmed the District Court, which held that "counterfeited" was one coverage and "forged as to signature" was a separate coverage, saying:

"Unless, further, it (counterfeited) is to be given application in a sense other than 'forged as to signature', it must be deemed meaningless and mere surplusage. This Court is of the opinion that the invoices in question were 'counterfeited written instruments', according to the meaning of the term as the parties intended to be bound by it in clause (E) of the indemnity bond. To conclude otherwise would be to give no effect whatever to the use of the word 'counterfeited.'"

174 Fed. Sup. 633.

The Court of Appeals for the Third Circuit, in affirming the District Court, says:

"We think that common usage would indicate that **counterfeit is something that purports to be something**

that it is not. And that is just what these spurious invoices (warehouse receipts in the present case) were. They looked all right, even as to details, but they were not what they seemed to be."

Fidelity Trust Co. v. American Surety Co., 268 Fed. 2d 805, 807.

Rules of construction require that "counterfeited" be not limited by the phrase "as to signature" which follows and modifies "forged" but does not modify "counterfeited."

"Thus the rule which requires that a limiting clause or phrase which follows several expressions be restricted to the last antecedent governs in the interpretation of a contract of insurance."

Couch, 2d Ed., § 15:13.

"No word in an insurance policy should be assumed to be superfluous or treated as superfluous or redundant."

Couch, 2d Ed., § 15:43.

"Counterfeited as to signature" and "forged as to signature" would have the same meaning. The words "forged as to signature" would cover the entire field.

That Aetna intended for the words to be construed as two different coverages is strongly indicated by the interpretation given the policy by Aetna's own attorney at the time he attempted to explain the company's refusal to accept liability under the bond. The attorney paraphrased the wording of the bond thus:

"Now that the litigation under discussion has been terminated as a result of the settlement mentioned in your present letter, we should like to place before

you our more detailed views in this matter . . . the warehouse receipts . . . were not **counterfeit** nor did they bear the **forged signatures** of any parties."

Exhibit Z, R. p. 333a, p. 336a.

From the above, it appears that there cannot be any question that Aetna intended to cover two separate types of losses; those from (1) counterfeiting and (2) forgery of signatures.

In the present case, the Court of Appeals for the Sixth Circuit has held that there was no counterfeiting:

"In our opinion, the warehouse receipts were not forged or counterfeited."

Sup. R. p. 4.

This ruling must have been based on either (1) an erroneous conception of what constitutes counterfeiting, as defined above, or (2) an erroneous interpretation of the effect of the modifying phrase "as to signature."

There is a conflict between this decision of the Court of Appeals for the Sixth Circuit and the earlier decision of the Court of Appeals for the Third Circuit. This conflict is regarding a matter of great importance to all National Banks, Federal Savings & Loan Associations, as well as other banking institutions insured by Bankers Blanket Bonds or similarly worded bonds.

As to Question 4.

After notification to Aetna and its refusal to accept liability, and in the absence of any objection to settlement, the Bank had a right to settle a loss covered by the bond without a litigated adjudication. There is no provision in the bond requiring that the Bank's loss must be estab-

lished by an adjudicated judgment. There is no provision in the bond denying to the insured the right to settle.

A reasonable, bona fide settlement is, prima facie at least, a valid claim. The reasonableness of the settlement was proved (R. p. 280, p. 317a).

This proof was not met or overcome by any evidence introduced by Aetna.

> "If the surety or the indemnitee has a legal right to adjust or settle the claim, either by reasons of the terms of his contract, or because of actions on the part of the indemnitor, it is only necessary that such an adjustment or settlement be a reasonable one and made in good faith."
>
> **National Surety Corp. v. Peoples Milling Co.**, 57 Fed. Sup. (W. Div. Ky.) (Miller, J.) 281;
> **Luton Mining Co. v. Louisville & N. R. Co.**, 276 Ky. 321, 331-335, 123 S. W. 2d 1053;
> See also **Ocean Accident and Guaranty Corp. v. Old National Bank**, 4 Fed. 2d 753 (6 Cir., Moreman, J.);
> **Conner et al. v. Reeves**, 103 N. Y. 527, 9 N. E. 439;
> **Damanti v. A. S Inger**, 153 Fed. Sup. 600;
> **Russ-Field Corp. v. Underwriters at Lloyds, London**, 330 Pac. 2d (Calif.) 432, 434, 440-441;
> **Thermopolis Northwest Electric Co. v. Ireland**, 119 Fed. Sup. 409 (10th Cir.);
> **Chicago, R. I. & P. R. Co. v. Dobry Flour Mills**, 211 Fed. 2d 785 (10th Cir.).

The settlement was shown to be reasonable because: (1) the issue of fact as to whether the creditor had reasonable cause to believe the debtor was insolvent was to be submitted to a jury; and (2) the courts have held that a creditor receiving a preference is charged with knowl-

edge of any facts which would have been disclosed by a reasonably prudent investigation.

In re Interstate National Bank v. Luther, 221 F. 2d 382 (10th Cir., 1955);
In re: Dutcher v. Wright, 94 U. S. 553;
Collier on Bankruptcy, 14th Ed., ¶¶ 60.53, 60.54.

As to Question 5.

The bond contains a contract as to attorneys' fees and court costs covering defense by the insured of cases of alleged liability. The clause provides:

> "The Underwriter will indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or **alleged liability** on account of any **loss, claim** or **damage** which, **if established** against the Insured, **would constitute a valid and collectible loss** sustained by the Insured under the terms of this bond. Such indemnity shall be in addition to the amount of this bond."

The reasonableness of attorneys' fees and legal expense were proved and not disputed (R. p. 272a, p. 278a).

As shown above, judgments recovered against the Bank in the suits filed would have been covered by the bond, because (1) the losses would have been through "false pretenses"; (2) the Bank's loan had been paid and Exclusion 1 (b) is not applicable; (3) the Bank extended credit on securities which were counterfeited. Attorneys' fees are therefore recoverable under the above provision of the bond, although no actual litigated judgment was recovered against the Bank. The Bank was defending "alleged

liability" within the meaning of the above provision. The contract places the Bank in the same position that the law places the insured in an ordinary liability policy where the insurance company refuses to defend "alleged liability."

American Indemnity Co. v. Sears Roebuck & Co., 195 Fed. 2d (6th Cir., Simons, J., 1952) 353;

South Knoxville Brick Co. v. Empire State Surety Corp., 126 Tenn. (Green, C. J., 1912) 402;

Hill v. Georgia Casualty Co., 158 Tenn. (McKinney, J., 1928) 194;

Boutwell v. Employers' Liability Ins. Corp., 175 Fed. 2d (5th Cir., Waller, J., 1949) 597;

Employers' Liability Assur. Corp. v. Youghiogheny and O. Coal Co., 214 Fed. 2d (8th Cir., Thomas, J., 1954) 418;

Lee v. Aetna Casualty and Surety Co., 178 Fed. 2d (2nd Cir., Learned Hand, J., 1949) 750;

Hardware Mutual Casualty Co. v. Shantz, 186 Fed. 2d (5th Cir., Borah, J., 1951) 868;

50 A. L. R. 2d 458 through 512

The quoted indemnity does not require an adjudicated loss, but indemnifies against attorneys' fees incurred in defending **alleged liability** although the defense is successful. The qualification is subjunctive. If the insured defends and loses, Aetna agrees to pay the "collectible loss" and "reasonable attorneys' fees"; if the insured defends and wins, Aetna agrees to pay attorneys' fees.

The District Court (affirmed by the Court of Appeals) erroneously thought that the Bank must have suffered a loss covered by the bond before it could recover attorneys' fees incurred in defense. The District Court lost sight of the indemnity in cases of "alleged liability."

(R. 334a, 335a.)

The lower courts should have allowed attorneys' fees even though the Bank won the Continental suit and even if the Court should conclude against recovery for the settlement made.

As stated in the Petition and as shown by the authorities above quoted, the Court of Appeals has strictly construed an indemnity contract in favor of the insurer and against the insured National Bank, contrary to the Tennessee Law controlling the construction of a Tennessee contract. It has rendered a decision in conflict with a decision of the Court of Appeals for the Third Circuit. The proper construction of the Bankers Blanket Bond is of extreme importance to National Banks and Federal Savings & Loan Associations. These institutions are insured by agencies of the Federal Government and may be required to carry indemnity insurance provided by Bankers Blanket Bonds, or similar bonds (12 U. S. C. A., § 1828c). The importance of a final determination of the meaning of these Bankers Blanket Bonds is evident from the fact that in preparing this case we have found 6 decisions involving the interpretation of similar bonds issued to National Banks, and have found 6 decisions construing Bankers Blanket Bonds (Standard Form No. 24) issued to National Banks. We have found 9 decisions construing similar bonds held by State Banks, and 3 decisions construing Bankers Blanket Bonds (Standard Form No. 24) issued to State Banks. We have found 2 decisions, one Federal and one State, involving similar bonds issued to Federal Savings & Loan Associations. This totals 26 decisions,* reaching varied conclusions as to the proper

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* The cases above referred to are:

Community Federal Savings and Loan Assn. v. General Casualty Co., 274 F. 2d 620;

Depositors' Trust Co. v. Maryland Casualty Co., 174 A. 2d 288 (Standard Form 24);

construction of these bonds. There are probably many other cases involving interpretation of similar indemnity contracts.

Dexter Horton National Bank v. U. S. F. & G. Co., 270 P. 790;
Employers' Liability Assurance Corp. v. Southern Savings & Building Assn., 340 S. W. 2d 201;
Fidelity and Casualty Co. v. Bank of Altenberg, 216 F. 2d 204;
Fidelity Trust Co. v. American Surety Co., 174 F. Supp. 630, 268 F. 2d 805;
First National Bank of South Carolina v. Glens Falls Ins. Co., 197 F. Supp. 264, 304 F. 2d 866 (Standard Form 24);
First Thrift of Los Angeles v. Pacific Indemnity Co., 95 Cal. App. 2d 463, 212 P. 2d 561;
Hartford Accident and Indemnity Co. v. Federal Deposit and Insurance Co., 204 F. 2d 933;
Hooker v. New Amsterdam Casualty Co., 33 F. Supp. 672;
International Union Bank v. National Surety Co., 245 N. Y. 368, 157 N. E. 269;
Johnstown Bank v. American Surety Co., 174 N. Y. S. 2d 385;
Manufacturer's National Bank of Troy v. U. S. F. & G. Co., 218 N. Y. S. 332, 218 App. Div. 455;
Metropolitan National Bank of Minneapolis v. National Surety Co., 48 F. 2d 611;
National Bank of Paulding v. The Fidelity and Casualty Co., 131 F. Supp. 121;
North Carolina National Bank v. U. S. Casualty Co. (W. D. N. C., 1962), 208 F. Supp. 452 (Standard Form 24);
Ocean Accident and Guaranty Corp. v. Old National Bank, 4 F. 2d 753;
Pasadena Investment Co. v. Peerless Casualty Co., 382 P. 2d 124;
People's Bank v. Fidelity & Casualty Co., 231 N. C. 510, 57 S. E. 2d 800, 15 A. L. R. 2d 966;
Provident Trust Co. v. National Surety Co., 44 F. Supp. 514, affirmed 138 F. 2d 252;
Rockland-Atlas National Bank v. Mass. Bonding and Ins. Co., 157 N. E. 2d 239 (Standard Form 24);
Security National Bank of Durand v. Fidelity and Casualty Co. of N. Y., 145 F. Supp. 667, affirmed 246 F. 2d 382 (Standard Form 24);
Security Trust and Savings Bank of San Diego v. N. Y. Indemnity Co., 220 Calif. 372, 31 P. 2d 365;
State Bank of Poplar Bluff v. Maryland Casualty Co., 280 F. 2d 544 (Standard Form 24);
Torrence National Bank v. The Aetna Casualty & Surety Co., 350 F. Supp. 638, affirmed (9th) 251 F. 2d 666 (Standard Form 24);
U. S. F. & G. Co. v. First National Bank of Fort Morgan, 364 P. 2d 202 (Colo., 1961) (Standard Form 24)

What does the Bankers Blanket Bond (Standard Form No. 24) cover? We need to have this Court decide, setting at rest the conflicts now present in the lower court decisions and making it possible for the insured banks to know what they are getting for their premium dollar.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted. Brief in support of this petition is hereto attached.

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APPENDIX.

OPINION OF THE COURT OF APPEALS.

(Filed Nov. 19, 1962, Carl W. Reuss, Clerk.)

No. 14772

United States Court of Appeals
For the Sixth Circuit

The First National Bank of Memphis, Plaintiff-Appellant, v. The Aetna Casualty and Surety Company, Defendant-Appellee.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided November 19, 1962.

Before: Cecil, Chief Judge, Weick, Circuit Judge, and Peck, District Judge.

Weick, Circuit Judge. The First National Bank of Memphis sued The Aetna Casualty and Surety Company in the District Court on a "Bankers Blanket Bond" to recover moneys which it paid in settlement of litigation with the trustee in bankruptcy of Butler-Foster Milling Company over an alleged voidable preference claimed by the trustee to have been received by the Bank.

The litigation with the trustee in bankruptcy arose out of loans made by the Bank to Butler-Foster Milling Company of Memphis, Tennessee totaling nearly $3,000,000

which were secured by negotiable warehouse receipts issued by Alabama Grain Elevator Company, Inc. of Mobile, Alabama certifying that soya beans belonging to Butler-Foster were in its possession. Landon V. Butler was the controlling shareholder, president and director of Butler-Foster and the elevator company. Butler-Foster paid $300,000 to the Bank on February 18, 1955 to apply on the loans reducing its debt to the Bank to $2,699,491.00 which was secured by twenty-six warehouse receipts issued by the elevator company calling for 1,367,739 bushels of soya beans. On March 1, 1955 Butler-Foster paid to the Bank the balance of the loans in full from the proceeds of sale of 1,299,839 bushels of soya beans described in warehouse receipts which it sold to Continental Grain Co.

Shortly thereafter Continental discovered that there were no soya beans in the warehouse to support the warehouse receipts and that they were worthless. Bankruptcy of Butler-Foster followed. Continental then sued the Bank and the trustee in bankruptcy in the District Court to rescind the purchase of the warehouse receipts and to recover the amount which it paid therefor claiming that the Bank received the money as a resulting trustee. The trustee in bankruptcy filed a cross-claim against the Bank to recover $2,699,491.00 on the theory that the payment of the Bank's loans constituted a preference voidable under the Bankruptcy Act. The trustee also filed a separate suit against the Bank to recover the payment made by Butler-Foster to the Bank on February 18, 1955 in the amount of $300,000.

The Continental lawsuit was decided by the Court in favor of the Bank on the ground that Continental had elected to affirm the sale and therefore could not rescind it. The court further held that the Bank had acted in good faith without knowledge of the fact that the warehouse receipts were unsupported by the beans. 162 F. Supp. 814.

An appeal was prosecuted to this Court by Continental. The cross-claim of the trustee against the Bank was reserved for later determination.

While the appeal was pending the Bank effected a settlement of the litigation with the trustee in bankruptcy for $650,000 of which $150,000 was paid to Continental as consideration for the dismissal of its appeal. The trustee retained $500,000 as consideration for the dismissal of his actions against the Bank. The Bank paid out $190,000 for attorneys fees and $13,859.95 for miscellaneous expenses. As part of the consideration for the settlement the Bank waived the filing of any claim against the estate of Butler-Foster in bankruptcy.

The facts were stipulated in the District Court and were adopted as findings of fact by the court. The court adopted conclusions of law which were to the effect that the payments made by the Bank were wholly voluntary and not covered by the bond. The court dismissed the complaint and the Bank appealed to this Court.

The Bank claimed that its loss was covered by Insuring Clause (B) of the bond which is set forth in footnote 1. We would have no difficulty in holding that the conduct of Butler-Foster amounted to obtaining money by false pretenses within the meaning of this clause. The real issue in the case, however, is whether coverage for the loss was

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(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, false pretenses, hold-up, misplacement, mysterious unexplainable disappearance, damage thereto or destruction thereof, whether effected with or without violence or with or without negligence on the part of any of the Employees, and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except in an office hereinafter excluded or in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation.

excluded by Section 1 (d) of the Exclusions which specifically provided that the bond does not cover:

> (d) Any loss, the result of the complete or partial nonpayment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clause (A), (D) or (E).

It will be noted that Insuring Clause (B) was not excepted from the Exclusion Clause 1 (d).

The District Court was of the view that the Bank's loss resulted from the nonpayment of loans made by it to Butler-Foster and hence came within the plain language of the Exclusion 1 (d).

If Continental had been successful in its action in the District Court against the Bank and the trustee in bankruptcy for rescission, the Bank would have been compelled to return to Continental the payment made on March 1, 1955 by Butler-Foster on its loans in the amount of $2,699,491.00. The parties would have been restored to their previous status. The Bank would then have its notes secured by warehouse receipts which were worthless. It would have a claim against the bankrupt's estate and share as a general creditor. It is conceded that had such situation existed Exclusion 1 (d) would have prevented recovery against Aetna under Insuring Clause (B) of the bond. **Community Federal Savings & Loan Association v. General Casualty Co.**, 274 F. 2d 620 (CA 8).

It is argued, however, that since the notes were paid, Section 1 (d) of the exclusions was no longer applicable. In our judgment, if no valid claim existed against Aetna at the time the loans were made and the worthless warehouse receipts were deposited as collateral with the Bank, the subsequent payment of the notes resulting in the suit

by the trustee to set aside a voidable preference created no liability where none theretofore existed. It was not intended by the bond to provide credit insurance for the Bank or coverage against preferences.

The District Court found that, in making the settlement with Continental and the trustee in bankruptcy, the Bank was motivated by considerations other than legal liability such as attorneys fees, costs and expenses and the time taken by its officers and employees in the preparation for and the defense of the trustee's lawsuits. While these considerations undoubtedly presented real problems to the Bank, they cannot be made the basis for imposing liability on Aetna for the sums paid out in settlement. Indemnity under the bond was afforded only for payments imposed by legal liability.

Finally, it is claimed that coverage was afforded under Insuring Clauses (D) and (E). In our opinion, the warehouse receipts were not forged or counterfeited. They were signed and issued by the elevator company and endorsed by Butler-Foster, all by duly authorized officers. Falsity lies in the representation of facts contained in the warehouse certificates and not in the genuineness of their execution. In common parlance, the warehouse certificates would not be considered as forged or counterfeited and certainly not at common law or under the statutes of Alabama or Tennessee. **Gilbert v. United States**, 370 U. S. 650; **Marteney v. United States**, 216 F. 2d 760 (CA 10); **The First National Bank of South Carolina of Columbia v. Glens Falls Insurance Company**, 304 F. 2d 866 (CA 4); **State Bank of Poplar Bluff v. Maryland Casualty Company** 289 F. 2d 544 (CA 8); **United States Fidelity & Guaranty Co. v. First National Bank of Ft. Morgan** (Colo. 1961), 364 P. 2d 202; **Mallory v. State**, 179 Tenn 615; **Harris v. State**, 19 Ala. App. 484; **Williams v. State**, 33 Ala. App. 119.

Since the loss was not covered by the bond, there was no liability for attorneys fees, costs and expenses.

We think that the conclusions of law adopted by the District Court were correct and its judgment is affirmed.

In the United States Court of Appeals
For the Sixth Circuit.

The First National Bank of Memphis, Plaintiff-Appellant, vs. The Aetna Casualty and Surety Company, Defendant-Appellee.	No. 14,772.

ORDER.

(Filed Dec. 21, 1962, Carl W. Reuss, Clerk.)

In this cause, on application of The First National Bank of Memphis, Plaintiff-Appellant, the issuance of mandate to the District Court is hereby stayed pending the timely filing of petition for certiorari to the Supreme Court of the United States, and, if the petition is duly filed, the mandate is further stayed until the action of the Supreme Court of the United States thereon.

/s/ Paul C. Weick,
United States Circuit Judge.

Approved:

Longstreet Heiskell,
Attorney for The First National Bank of Memphis, Plaintiff-Appellant.

Cooper Turner, Jr.,
Attorney for The Aetna Casualty and Surety Company, Defendant-Appellee.